

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE,

Plaintiff

v.

Civil No. 00-122-B-C

UNITED STATES DEPARTMENT OF THE
INTERIOR, UNITED STATES
GEOLOGICAL SURVEY, UNITED STATES
FISH AND WILDLIFE SERVICE, UNITED
STATES DEPARTMENT OF COMMERCE,
and NATIONAL MARINE FISHERIES
SERVICE,

Defendants

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

In this dispute between Plaintiff the State of Maine and Defendants, United States Department of the Interior (“DOI”), United States Geological Survey (“USGS”), United States Fish and Wildlife Service (“USFWS”), United States Department of Commerce (“DOC”), and National Marine Fisheries Service (“NMFS”), over Defendants’ obligation under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to disclose information regarding the listing of the Atlantic salmon population in eight Maine rivers as a distinct population segment eligible for protection under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1543, the Department of Interior Defendants (“DOI Defendants”)—DOI, USGS, and USFWS—have appealed the

Court's Memorandum of Decision and Order of December 26, 2000 (Docket No. 29), amended by the order of January 2, 2001 (Docket No. 33) (hereinafter jointly referred to as "Amended Summary Judgment Order"). *See* Notice of Appeal (Docket No. 35). Now before the Court is Defendants' Motion for Stay Pending Appeal (Docket No. 34). In this motion, Defendants request that the Court stay the portion of the Amended Summary Judgment Order that requires the DOI Defendants to disclose 197 documents to Plaintiff until the Court of Appeals resolves the issues raised by the DOI Defendants' appeal.¹ Alternatively, the DOI Defendants ask the Court to grant a temporary stay of this portion of the Amended Summary Judgment Order so that they can petition the Court of Appeals for a stay. For the reasons discussed below, the Court will grant Defendants' Motion to Stay disclosure of the documents pending the Court of Appeals' resolution of the DOI Defendants' appeal.

BACKGROUND

Plaintiff's quest to obtain the 197 documents at issue in this motion began on January 18, 2000, when Plaintiff served a FOIA request on Defendants requesting documents relating to Defendants' decision to propose the listing of the Atlantic salmon population in eight Maine rivers as a species endangered under the ESA. *See* Plaintiff's Statement of Material Facts (Docket No. 6) (hereinafter "PSMF") ¶ 3. These documents were included amongst the 307 documents that the DOI Defendants determined to be responsive to Plaintiff's FOIA request but which Defendants asserted were protected from disclosure by FOIA exemptions. *See* PSMF ¶ 4. After an unsuccessful administrative appeal of the DOI Defendants' decision to withhold these documents as exempt under the FOIA, *see* PSMF ¶¶ 6, 7, Plaintiff filed a lawsuit in this Court on June 13,

¹ Although the Motion for a Stay is postured as applying to all Defendants, only the DOI Defendants have appealed the Court's Amended Summary Judgment Order and the Court's Amended Summary Judgment Order directed only the DOI Defendants' to disclose documents. This Memorandum of Decision and Order, therefore, applies only to the DOI Defendants.

2000, alleging, in part, that the DOI Defendants' withholding of the documents violated the FOIA. *See* Complaint (Docket No. 1). On October 2, 2000, Defendants filed a motion for partial summary judgment pertaining to these documents. *See* Defendants' Motion for Partial Summary Judgment, Including Incorporated Memorandum of Law (Docket No. 14). Plaintiff filed a response to Defendants' motion for partial summary judgment and cross-moved for partial summary judgment on October 20, 2000. *See* Plaintiff State of Maine's Motion for Partial Summary Judgment and Opposition to Defendants' Motion for Partial Summary Judgment, With Incorporated Memorandum of Law (Docket No. 15). In its resolution of the issues raised by the parties' cross-motions for summary judgment, the Court ordered that the DOI Defendants disclose 197 of the withheld documents to Plaintiff. *See* Amended Summary Judgment Order. Defendant has filed a Notice of Appeal of that decision with the Court, and has now moved the Court for a stay of its order to disclose the documents.

DISCUSSION

Four factors influence a court's determination of whether to grant a stay of its order pending appeal: the likelihood that the party seeking a stay will succeed on the merits in its appeal; whether the party seeking a stay will undergo irreparable harm if the court does not issue a stay; whether the court's issuance of a stay will result in substantial harm to other parties interested in the proceedings; and where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776-77, 107 S. Ct. 2113, 2119 (1987). The consideration of these factors is an equitable one, *see John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308, 109 S. Ct. 852, 853 (1989), and a strong showing of one factor may compensate for a weak showing of other factors. *See Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979); *Nadar v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000).

Defendants argue that the Court's evaluation of these factors should lead the Court to conclude that a stay is warranted in this case. Defendants predict that they face a significant likelihood of success on their appeal of the following aspects of the Court's amended December 26, 2000, Memorandum of Decision and Order: the determination that the FOIA's incorporation of the attorney work product privilege under 5 U.S.C. § 552(b)(5) ("FOIA Exemption 5") does not protect factual information reasonably segregable from an attorney's thought processes; the holding that material must be prepared primarily in anticipation of litigation in order to receive protection under Exemption 5's incorporation of the work product doctrine; the requirement that in order to withhold documents as protected by the attorney-client privilege under FOIA Exemption 5, an agency must demonstrate that the material is based on a client-communicated confidential fact; and the Court's refusal to allow the DOI Defendants an opportunity to update their Vaughn index before ordering disclosure of the documents. Defendants also argue that the Court's denial of the stay will cause them irreparable harm in two forms: the evisceration of Defendants' right to meaningful appeal of the Court's Amended Summary Judgment Order and a chilling effect on attorney-client communications and attorney preparation that will undermine the relationship between agencies and their attorneys. These consequences, Defendants contend, also cause the public interest factor to weigh in favor of a stay. Defendants argue that the Court's issuance of a stay, in contrast, will only prevent Plaintiff from obtaining materials that it wishes to use in its lawsuit challenging Defendant's final listing of the Atlantic salmon population as endangered—a harm that Defendants maintain is not cognizable under the FOIA.² Plaintiff responds that Defendants do not face a significant likelihood of success on the issues raised on their appeal, that a stay will cause it substantial harm in the form of further delay in obtaining documents that it has

² Defendants refer to the lawsuit that Plaintiff has filed in this Court challenging Defendants' final listing decision, *State of Maine v. Babbitt*, Civil Action No. 00-250-B-C.

sought for over a year and needs for its lawsuit challenging Defendants' listing decision, and that, given the FOIA's purpose of opening up agency action to public scrutiny, the public interest weighs in favor of disclosure. Plaintiff also disputes Defendants' assertion of irreparable harm, expressing disbelief that the Court's denial of Defendants' application of a stay will harm the relationship between agencies and their clients and proposing that the Court issue a protective order restricting Plaintiff's disclosure of the documents as a way to address Defendants' concern of widespread disclosure of the documents.

Consideration of the four equitable factors leads the Court to conclude that a stay pending resolution of the DOI Defendants' appeal is warranted. Most persuasive to the Court is the DOI Defendants' contention that a refusal to issue a stay will have an irreparably harmful effect on their right to appeal the Court's order to disclose documents. As the Court of Appeals for the First Circuit in *Providence Journal* explained, the DOI Defendants' right to meaningful review of the disclosure order will become moot upon disclosure of the documents because "confidentiality will be lost for all time" and "[t]he status quo could never be returned." *Providence Journal Co.*, 595 F.2d at 890. The Court does not find Plaintiff's attempts to distinguish this case persuasive. Nor is the Court persuaded that Plaintiff's proposed protective order would fully obviate the significant harm that Defendants have identified to their appeal right. Although Defendants have not set forth a showing sufficient to convince the Court that its refusal to grant a stay would have an irreparably harmful effect on the relationship between agencies and attorneys, the loss of the right to appeal alone convinces this Court that this factor weighs strongly in favor of Defendants.

In contrast, the Court finds that Plaintiff's articulation of the harmful effect that a stay will cause it is neither relevant under the FOIA nor substantial. The only injury that Plaintiff identifies is the impediment that the Court's grant of a stay will render on its ability to use these documents

in its listing lawsuit. “However, it is settled that the disclosure provisions of the FOIA are not a substitute for discovery.” *Columbia Packing Co., Inc. v. U.S. Dep’t of Agriculture*, 563 F.2d 495, 500 (1st Cir. 1977) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10, 95 S. Ct. 1504, 1513 n.10 (1975)). Moreover, the Court’s grant of a stay in this FOIA lawsuit will prevent neither Plaintiff from resorting to normal discovery procedures in its listing lawsuit to obtain the documents it claims it needs nor the Court from ruling on such discovery motions.

The Court must also evaluate the likelihood that Defendants will succeed on the merits in their appeal. The Court carefully considered all of the issues resolved in its Amended Summary Judgment Order and does not believe that Defendants have set forth a strong showing of their likelihood of success on appeal. However, the Court of Appeals has yet to specifically address several of the issues raised by Defendants’ appeal. While the Court believes that its Amended Summary Judgment Order appropriately resolved these issues, particularly in light of Defendants’ burden to establish the applicability of the FOIA exemptions, *see* 5 U.S.C. § 552(a)(4)(b), and the Court of Appeals’ instructions to construe FOIA exemptions narrowly, *see Church of Scientology v. United States Dep’t of Justice*, 30 F.3d 224, 228 (1st Cir. 1994); *Gov’t Land Bank v. General Services Admin.*, 671 F.2d 663, 665 (1st Cir. 1982), it is possible that the Court of Appeals may come to a different conclusion with respect to the Court’s construction of the attorney-client and attorney work product privileges under FOIA Exemption 5. “Where, as here, the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.” *Providence Journal Co.*, 595 F.2d at 890. Hence, the Court concludes that this factor presents in a posture of equipoise.

For the reasons discussed in its Amended Summary Judgment Order, the Court believes

that disclosure of the documents will serve the public interest by advancing the FOIA's purpose of opening agency actions up to public scrutiny. *See Church of Scientology*, 30 F.3d at 228.

However, the Court does not believe that a postponement in the implementation of this order will significantly undermine the public interest in disclosure. More significant to the Court is the public interest in the appeal right as one component of the constitutional right to due process in enforcement of the nation's laws. The Court also observes that, just as the FOIA disclosure provisions serve to promote the public interest in review of agency actions, the FOIA exemptions serve to promote other important public interests. Preserving the DOI Defendants' right to appeal not only will promote the public interest in the due process right to appeal but will also promote the public interest in accurate interpretation of the exemptions at issue.

CONCLUSION

The Court concludes that the following factors favor the granting of Defendants' Motion for a Stay: the certainty of irreparable harm to the DOI Defendants in the absence of a stay; the insubstantial harm that a stay will cause Plaintiff; and the public interest in the accurate interpretation of the FOIA exemptions and the right to appeal. The Court thereby **ORDERS** that Defendants' Motion for a Stay of that provision of the Court's Amended Summary Judgment Order requiring the DOI Defendants to disclose documents to Plaintiff be, and it is hereby, **GRANTED** pending resolution of the DOI Defendants' appeal.

GENE CARTER
District Judge

Dated at Portland, Maine this 5th day of February, 2001.

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